IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1919 OF 2003.

Suresh Maikulal Gupta. ... Petitioner

Versus.

State of Maharashtra & anr. ... Respondents.

Shri Rajiv Patil i/by Shri Milind Sawant for the Petitioner.

Shri R.Y.Mirza, A.P.P.for the Respondent.

Shri M.L.Bansal for the Respondent No.2.

CORAM : ABHAY S. OKA, J.

DATED : 23rd June, 2005.

P.C.:

1. On 14th June 2005 this petition was called out and submissions of the learned Counsel for the Petitioner were heard. On that day this petition was ordered to be kept on 22nd June 2005. Yesterday i.e. 22nd June 2005 when this petition was called out none was present for the Respondent No.2, who is the contesting Respondent and therefore, with a view to give one more opportunity to the Respondent No.2 this petition was kept today.

Today I have heard the Counsel for the Petitioner.

2. The challenge in this petition is to the Judgment and order dated 1st November 2003 passed by the Additional Sessions Judge, Mumbai, in Application No.307 of 2002 in Appeal No.256 of 2000.

3. The Petitioner herein is the original Complainant in a complaint filed under section 138 of the Negotiable Instruments Act, 1881 in the Court of the learned Addl.Chief Metropolitan Magistrate at Borivali. The Respondent No.2 is the Accused. By Judgment and order dated 11th October 2000, the learned Addl.Chief Judicial Magistrate, 24th Court, Borivali, Mumbai convicted the Respondent No.2 for offence punishable under section 138 by the Negotiable Instruments Act and he was sentenced to suffer R.I. for six months and to pay a fine of Rs.7.50 lakhs. In default, he was ordered to undergo S.I. for six months. Against the said order of conviction and sentence, an appeal was preferred by the Respondent No.2 in the Sessions Court. The Appeal was admitted on 8th November 2000. An application was filed by the Respondent No.2 purported to be an application under section 391 of the Code of Criminal Procedure, 1973, (hereinafter referred to as "the said Code") on 28th July 2002 praying for permission to adduce additional evidence. The said Application has been allowed by the order impugned in this Petition.

4. The learned Counsel appearing for the Petitioner submitted that the application was belatedly filed when the Appeal was about to be heard finally. He pointed out the prayers made in the said Application. The first two prayers were for making the witnesses available for cross-examination by Respondent No.2. The said

witnesses are not examined by any party. The third prayer was for issuing summons for production of documents and the fourth prayer in the Application was for leading further evidence. The next prayer in the Application was that the evidence should be taken by the Appellate Court before commencement of hearing of the Appeal. The learned Counsel submitted that there was no ground made out for granting liberty under section 391 of the said Code.

5. The learned Counsel for the Respondent No.2 submitted that it was a specific case of the Respondent No.2 from the inception that that the cheques were taken from the Respondent No.2 towards contribution for joint venture transaction. The case of the Respondent No.2 was that the Respondent No.2 and the Chairman of the Company of the Complainant were engaged in joint venture of advancing loan against the shares of Greenfield Trading and Finance Co.Ltd. He submitted that the investment was made for acquiring shares of the said company. He submitted that the prayer was for production of original share transfer deeds relating to 35,000 shares standing in the joint names of the Respondent No.2 and Shri Manoj Jain, who is the Chairman of the Company of the Complainant. He submitted that the evidence of the Auditor/Accountant will also be necessary for establishing the defence of the Respondent No.2 and evidence of Shri Manoj Jain, who is the

Chairman of Azad Finance and Investment Ltd., is required to be led for the purpose of establishing the defence case. He submitted that the Respondent No.2/Accused cannot be deprived of an opportunity to lead defence evidence.

6. I have considered the rival submissions. It is pertinent to note that it is not the case made out by the Respondent No.2 in the Application under section 391 of the said Code that his Advocate misled him and therefore, he declined to lead defence evidence. It is pertinent to note that when the Complainant was being cross-examined on 9th December 1998, the Advocate for the Respondent No.2 sought time for producing documents relating to transfer of shares of M/s.Greenfield Trading and Financing Ltd. and therefore, further cross-examination was adjourned. As stated earlier, the order of conviction was passed on 11th October 2000 and thereafter in November 2000 Appeal wad admitted. There is no explanation given in the application for filing the same belatedly on 20th July 2002. In the application it is asserted that an application was tendered by the Advocate for the Respondent No.2 before the trial Court for issuing witness summons to M/s.Greenfield Industries Ltd. to depute some of its servant for production of the original transfer deeds. It is alleged that the learned Magistrate did not entertain the said application and the application was

returned to the Advocate for the Respondent No.2. It is pertinent to note that no material particulars of the said application, such as the date on which the said application was tendered, the date on which the said application was rejected are mentioned in the application. Even a copy of the said an application allegedly made to the learned Magistrate is not annexed to the present Application. As stated earlier, even the cross-examination of the Complainant was adjourned at the instance of the Advocate for Respondent No.2 to enable him to take further steps of producing the documents pertaining to the alleged transfer of shares of M/s.Greenfield Industries Ltd. At no stage from the year 1998 when time was granted to the Respondent No.2, till the date of filing of the Application, any efforts were made by the Respondent No.2 to take appropriate steps to have the alleged documents produced on record. The Application was filed as stated earlier, nearly two years after the Appeal was preferred.

7. In my view the said Application could not have been granted by the learned Judge without there being any explanation for the delay. Prayers (a-i) and (a-ii) in the Application made by the Respondent No.2 indicate that the Respondent No.2 desires to have the Auditor and one Manoj Jain for cross-examination. The said two persons were not at all examined as witnesses. No case is made out for examining the said two persons as Court

witnesses and that also at such a belated stage. In my view prayers (a-i) and (1-ii) are completely misconceived.

8. There is one more aspect of the matter. The prayer in the Application was for directing the learned Magistrate to record additional evidence and in the alternative, it was prayed that the Appellate Court should record the evidence. There is no discussion on this aspect in the impugned order and the learned Judge allowed the said application without clarifying whether the evidence will be recorded by the Trial Court or by the leanred Judge himself and whether the witnesses will be called as Court witnesses or as the Defence witness..

9. In my view the very object of enacting section 138 of the Negotiable Instruments Act, 1881 will be defeated if the accused is permitted to lead defence evidence by examining witnesses at such a belated stage when Appeal against order of conviction and sentence is ready for hearing. Therefore, in my view the impugned order is unsustainable and deserves to be quashed and set aside.

10. Hence the following order is passed:

(i) The impugned Judgment and order dated 1st November 2003 passed below Application No.307 of 2002 in Appeal No.256 of 2000

is quashed and set aside and the Application No.307 of 2002 stands dismissed.

(ii) It is made clear that the observations made in this Judgment are for the limited purpose of considering the present Application and all contentions of the parties in the pending Appeal are expressly kept open.

(iii) Parties to act on an authenticated copy of this order.

(iv) Writ to be sent expeditiously,

Judge.